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May 7, 2008

## MEMO ENDORSED

Via Fax (212) 805-7949

Hon. Justice P. Kevin Castel  
U.S. District Court, Southern District  
United States Courthouse  
500 Pearl Street  
New York, NY 10007-1312

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Re: *United National Specialty Insurance Company v. 1854 Monroe Avenue H.D.F.C. and Eulalia Balaguer*  
Docket No.: 07-CV-10934  
Our File: 07-544

Dear Judge Castel:

We represent the plaintiff in the above captioned declaratory judgment action. We write to request a pre-motion conference, so that we may move for summary judgment in favor of United National Specialty Insurance Company ("United National") and against Eulalia Balaguer ("Balaguer"), in view of the default judgment recently entered in this action against to 1854 Monroe Avenue H.D.F.C. ("Monroe")

United National issued a policy of insurance to Monroe, covering the period from May 5, 2006 through May 5, 2007. On May 30, 2007 Balaguer commenced an action in the Supreme Court of New York, Bronx County against United National's insured, Monroe. In that underlying bodily injury action, Balaguer claims that on December 20, 2006, she was injured when she fell on a premises owned and operated by Monroe. Monroe provided United National with notice of Balaguer's accident on July 20, 2007, which violated a policy provision requiring Monroe to provide timely notice of an occurrence, claim or suit. Balaguer, failed to provide any independent notice of the incident to United National.

**MIRANDA SOKOLOFF SAMBURSKY SLONE VERVENIOTIS LLP**

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United National disclaimed coverage to both its insured, Monroe and Balaguer, the claimant/plaintiff in the underlying action. On or about October 9, 2007, United National commenced the instant declaratory judgment action seeking a declaration from the Court that United National is not obligated to defend and indemnify Monroe or Balaguer.

Monroe failed to answer or otherwise appear in this action and United National sought a default against them. On or about March 20, 2008, United National moved for a default judgment against Monroe. United National made this motion on notice to both Monroe and Balaguer, giving both parties an opportunity to challenge the default motion. Neither Monroe nor Balaguer challenged the motion and on April 4, 2008, this Court issued a default judgment which ordered adjudged and decreed that United National has no obligation to defend or indemnify Monroe in the underlying bodily injury action commenced by Balaguer in the Bronx.

United National now seeks the Court's permission to move for summary judgment against Balaguer based on the clearly established case law that Balaguer is estopped from relitigating the issue of coverage as a claimant can have no greater rights under a policy of insurance than the insured. See D'Arata v. New York Central Mutual Fire Insurance Company, 76 N.Y.2d 659, 563 N.Y.S.2d 24 (1990). Under New York Insurance Law 3420<sup>1</sup>, a claimant can bring a direct action against an insurer after that claimant has obtained a judgment against the insured. However, when a claimant brings such a suit, he does so as a subrogee of the insured and can have no greater rights under the policy than the insured would have. See D'Arata supra. Therefore, in order for Balaguer to collect under a direct action against United National, Balaguer would have to litigate Monroe's rights under the policy. However, this issue was already adjudicated at bar, by the Court's declaration that United National has no duty to defend or indemnify Monroe.

Should Balaguer obtain a judgment against Monroe and then bring a direct action against United National, Balaguer will be collaterally estopped from litigating the issue necessary for her to collect under United National's policy with Monroe, which is Monroe's rights under the policy. Under New York Law, in order for Collateral estoppel to apply, a Court must find that 1) the identical issue was necessarily decided in the prior action and is decisive in the present action, 2) the party to be precluded from relitigating must have had a full and fair opportunity to litigate. See D'Arata supra.

The issue of United National's obligation to Monroe under the policy has already been litigated by this Court in the default judgment issued against Monroe. The determination of Monroe's rights would be decisive in an action which Balaguer may bring as a subrogee to Monroe's rights. Additionally, Balaguer had a full and fair opportunity to oppose the default motion in which United National's obligation to Monroe was adjudicated. However, Balaguer

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<sup>1</sup> New York law applied in this case because we have a New York insured who was issued the policy in New York.

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chose not to oppose that motion. Collateral estoppel will apply to a default motion where a party against whom preclusion is sought had an opportunity to appear in the prior action, yet does not take part in the proceeding despite the opportunity to do so. See In the Matter of Samuel A. Abady, 22 A.D.3d 71, 800 N.Y.S.2d 651 (1<sup>st</sup> Dep't 2005). As United National's motion was made on notice to both Monroe and Balaguer, and neither opposed it, the determination in that default judgment will have a preclusive affect on both parties.

Based on the above undisputed facts and law, United National is entitled to a summary judgment against Balaguer. As Balaguer can have no greater rights under United National's policy with Monroe than Monroe, Balaguer cannot seek to relitigate this Court's adjudication of Monroes rights under the policy. Therefore, this Court should allow United National to move for summary judgment against Balaguer.

Respectfully submitted,  
MIRANDA SOKOLOFF SAMBURSKY SLONE VERVENIOTIS LLP

Steven Verveniotes (SV 8800)

cc:

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*Premotion conference  
request is waived.  
File motion by May 23.  
Response due June 13  
ad as reply due June 24.  
60 ORDERED  
with  
VSDJ  
5-7-08*